



BOARD OF INQUIRY (*Human Rights Code*)

Library

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c.H.19, as amended;

AND IN THE MATTER OF the complaint by Karin Donnan dated August 12, 1990, alleging discrimination in employment on the basis of handicap and harassment.

B E T W E E N :

Ontario Human Rights Commission

- and -

Karin Donnan

Complainant

- and -

Health Systems Group Limited

Douglas Cowan

St. Clair Club

Marjorie Marino

M.A. Stewart

Sheila Wesley

Wittington Properties Limited

Dr. Tepperman

George Weston Ltd.

Central Canada Grocers Inc.

Respondents

DECISION

Adjudicator : Raj Anand
Date : January 18, 1996
Board File No: 92-0067
Decision No : 96-003

Board of Inquiry (*Human Rights Code*)

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A P P E A R A N C E S

Ontario Human Rights Commission)	Catherine Pike, Counsel
)	
)	

Karin Donnan)	Joseph Kary, Counsel
)	
)	

Health Systems Group Limited, Douglas)	Ronald Carr, Counsel
Cowan, St. Clair Club, Marjorie Marino,)	
M.A. Stewart and Sheila Wesley)	

Wittington Properties Limited, Dr. Paul)	David Wires, Counsel
Tepperman, George Weston Ltd. and)	
Central Canada Grocers Inc.)	

REASONS FOR DECISION

INTRODUCTION

Following hearings and rulings on certain preliminary matters, the parties were able to reach a settlement of this matter. Draft Minutes of Settlement were forwarded to me with a request that I issue an order disposing of the complaint in accordance with the annexed Minutes of Settlement.

I convened a conference call to discuss certain aspects of the proposed Minutes of Settlement. During this conference call, counsel for the Respondents raised concerns about maintaining the confidentiality of the settlement. One provision of the settlement document provided :

The parties hereto, excluding the Commission ... agree to keep the terms of settlement of the issues between them and the contents of all settlement documents and correspondence confidential and not disclose the terms to any other person ...

The parties had a number of discussions following the conference call, but were unable to agree upon a procedure for closing this matter.

As counsel for the Commission stated in requesting my assistance in this regard:

The Commission has, at times, asked a Board of Inquiry to issue an order disposing of the matter merely upon the consent of the parties. Counsel for the Boards of Inquiry office has advised me that such a procedure would be acceptable. Such a course of action would immunize the Boards of Inquiry office from an application under the *Freedom of Information and Protection of Privacy Act*, as there would be no settlement documentation to produce. It would not, of course, prevent a successful application being made to the Commission, since a copy of the documentation would be kept at the Commission offices.

Counsel for the Complainant has indicated that his client is not in agreement with the suggestion of counsel for the Respondents that the settlement documentation not be filed with the Board. I have been unable to arrange a conference call among all the parties to resolve the matter, perhaps because it lacks urgency. Nevertheless, it must be resolved.

SUBMISSIONS OF THE PARTIES

I invited written submissions from the parties concerning the proper manner in which to dispose of this matter, having regard to the settlement between them and the provisions of the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31.

The Commission took no position on this issue.

Counsel for the Respondents submitted that, as suggested by the Commission in the above excerpt, an order could be filed disposing of the matter on consent without filing the Minutes of Settlement. According to Mr. Carr, "such a procedure would give some measure of protection from an application under the *Freedom of Information of Privacy* [sic] *Act*. If a party were to seek production from the Board of Inquiry, the only document available would be the order together with copies of such other documentation as may have been filed during the course of the proceedings." Mr. Carr indicated his understanding that an application to the Commission for production of documents would be given "due consideration", and that the Respondents would have an opportunity to make submissions before the settlement document was released. Mr. Carr indicated his client's satisfaction with such an arrangement, "as it permits the fullest opportunity to protect and preserve the agreement of the parties to maintain the terms of the settlement confidential". Mr. Carr noted that counsel for the Complainant wished the settlement documentation to be filed with the Board of Inquiry, and regarded such a position as a contravention of the confidentiality obligation in the Minutes of Settlement.

Mr. Wires adopted Mr. Carr's submissions.

Mr. Kary, for the Complainant, indicated his client's objection to a deviation from the normal practice, which was for Minutes of Settlement to be filed with both the Board and the Commission. Mr. Kary noted that the Respondents' position carried "an implication that the Commission would somehow

treat a request differently from the way the Board would treat such a request". Mr. Kary regarded the Respondents' attempt at "evasion" as "clearly ineffectual", considering that section 25 of the *Freedom of Information and Protection of Privacy Act* requires an institution that receives a request to forward it to another institution if it knows that that other institution has the information being sought. Similarly, the Complainant's counsel continued, the individual Respondents, at least, would have an opportunity to make submissions to the Board or to the Commission before any determination as to release was made. He asserted that "the same rules apply in both cases".

Following review of counsel's written submissions, I wrote to them, requesting more precise submissions from the parties as to the likely application of the *Freedom of Information and Protection of Privacy Act* to the settlement documents in the forms being urged upon me by the two sides. I also requested the parties' guidance as to the impact, if any, of a recent Divisional Court decision, and decisions of the Information and Privacy Commissioner of Ontario.

Mr. Carr reiterated his earlier submissions, and asserted that the difference between the two procedures being suggested was "that production would be automatic if the Minutes of Settlement are filed with the Board of Inquiry and production could only be made after appropriate notice, submissions and a decision if filed with the Commission". Mr. Wires adopted Mr. Carr's submissions, and asserted that if parties to proceedings before a Board of Inquiry could not settle their differences by a confidential agreement, there would be an adverse effect upon the "fair, reasonable and private" resolution of disputes before the Board.

Mr. Kary, in response, noted that one government institution has an obligation to investigate whether there are relevant records in the possession of other institutions. It was also submitted that in appeal decision M-910405, reasonable steps to locate a record by the Durham Regional Police Services Board were taken to include investigating the personal records of a police officer who had, by then, left the force. Thus, Complainant's counsel submitted, "if the Board is to comply with its duties under

the *Freedom of Information Act* to any extent whatsoever, then a request to the Board will reveal the location of the settlement documents, even if they are not in the Board's physical possession".

THE ISSUES

The narrow dispute between the parties following their settlement of this complaint raises three issues, only the first of which, and perhaps the second, need to be dealt with:

1. Does the *Freedom of Information and Protection of Privacy Act* apply to the Board of Inquiry?
2. Is any greater protection provided if the Minutes of Settlement are not filed along with the order of the Board, although they are on file with the Commission?
3. Is a Minutes of Settlement reached after the commencement of a Board of Inquiry proceeding under the *Human Rights Code* accessible to a member of the public?

CONCLUSION

It does not appear that a Board of Inquiry appointed pursuant to the *Human Rights Code* is an institution as defined in the *Act*. Accordingly, no requests pursuant to the *Act* can be made to it, and so the entire issue is moot.

Even if the Board of Inquiry were found to be an institution under the *Act* (if the Board took the position that it was not subject to the *Act*, the matter would have to be dealt with on appeal to the Commissioner), it would not be useful to "hide" the document at the Commission. The Board would have to forward any request it received to the Commission. Furthermore, I would be loath to suggest that the Commission would provide more "protection" to the document than would the

Board. The sections of the *Act* protecting individuals' personal privacy apply regardless of which institution is being approached for the information. In fact, both the Commission and the Board, if found to be an institution, would have the same head (the Minister of Citizenship) for purposes of the *Act*.

Because of the answers to the first and second issues, and in light of the circumstances of this case, it is unnecessary to decide whether the Minutes of Settlement would be subject to disclosure under the *Act* in any event. It is arguable that the Minutes of Settlement, resolving a dispute, constitute personal information of all of the parties, and are therefore not subject to disclosure.

REASONS FOR CONCLUSION

1. Does the *Act* apply to a Board of Inquiry appointed pursuant to the *Human Rights Code*?

Section 2 of the *Act* defines "institution" as a Ministry of the Ontario Government or any agency, board, commission, corporation or other body designated as an institution in the regulations. The Commission is an institution for the purposes of the *Act*, as set out in R.R.O. 1990, Reg 460, and so a request could be made to the Commission for any copy of the Minutes of Settlement it retained. The Board is not an institution under the *Act*. It is not specifically listed in the Regulations: R.R.O. 1990, Reg 460 as amended by O. Reg. 371/91, 135/92, 497/92, 532/93, 305/94 and 88/95.

All counsel seemed to be operating on the assumption that the Board of Inquiry would be subject to a request under the *Act*. Unless the Board could be considered part of the Commission or the Ministry (discussed below), it is not subject to the *Act*. If this is the case, then the entire issue argued by the parties is moot, as no request for access to information can be made to the Board under the *Act*.

Any request for access to the Minutes of Settlement made *outside* the scope of the *Act* can be easily dealt with: I would direct the Registrar of the Board of Inquiry to respond solely by referring any such request to the Ontario Human Rights Commission.

It is possible that a requestor, who is thereby denied access by the Board, on the basis that it is not an institution as defined by the *Act*, could appeal to the Information and Privacy Commissioner, who could then decide that the Board is an institution because it is part of the Human Rights Commission or the Ministry of Citizenship. I would suggest that the Board cannot be considered part of the Human Rights Commission, because of course the Commission can be a party before it. In the Information and Privacy Commissioner's Order P-589, the Mining and Lands Commissioner was found not to be within the Ministry of Natural Resources for purposes of the *Act* because it was independent of that Ministry and exercised independent administrative and quasi-judicial functions. Appeals of its decisions were made to the courts and not to the Minister of Natural Resources. Conversely, the Psychiatric Patient Advocate Office has been found to be an institution as part of its parent Ministry, the Ministry of Health.

By these criteria, the Board of Inquiry would not be considered part of the Ministry of Citizenship, since the Board of Inquiry is a quasi-judicial body which operates independently of the Ministry and is answerable only to the courts in its decision-making capacity.

2. Greater protection if not attached to order of Board of Inquiry?

As pointed out by counsel for the Complainant, the Board (if it were an institution) would have to refer any request it received for access to the Minutes of Settlement to the Commission, pursuant to section 25 of the *Act*. Thus, the fact that the Board does not have the document itself would not be an absolute shield to a request. The Respondents' submissions suggest that there is greater protection for a document that is in the control of the Commission than a document in the files of the Board.

Subsection 28(1) of the *Act* requires a head to give written notice to the individual to whom the information relates before granting a request for access to a record if the record "is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21(1)(f)". That person then has the right to make representations to the head "as to why the record or the part thereof should not be disclosed" (s.28(5)).

This requirement applies to any institution, and so it would apply to both the Board (if it were determined to be, or became, an institution) and the Commission. It only applies, however, if the head is going to disclose something that he or she has reason to believe "is personal information that ... might constitute an unjustified invasion of personal privacy". If the head has no reason to believe that the Minutes of Settlement (or the part of it which might be severed and disclosed) constitutes personal information, then there is no requirement of notice and no right to make submissions.

It is possible that Ms. Pike was referring, in her correspondence, to a *policy* of the Commission to allow a person to whom information (not necessarily personal information) relates to make submissions regarding its disclosure beyond the requirements of the *Act*. Otherwise, there is no difference between the protection provided to a record in the custody of the Commission, as opposed to the Board of Inquiry, even if the Board of Inquiry is or becomes an institution for purposes of the *Act*.

In any event, in my respectful view, any such policy does not constitute a proper basis on which to rely upon a distinction between the Commission and the Board. To do so would suggest that different institutions take the issue of personal privacy more seriously than others, or worse, that the Commission takes the statutory right of access to public information less seriously than other institutions. The head of both institutions (if the Board were considered a part of the Ministry), would be the Minister of Citizenship, who is the head of the Commission (Reg. 460, s.2(1)). He or she has a responsibility to exercise a discretion to disclose or refuse to disclose records according to the purposes of the *Act*, which include a right of access to information in the hands of government

and protection of the privacy of individuals with respect to personal information about themselves held by the government (section 1). It would be problematic to make an order based on an assumption that the Minister of Citizenship would exercise that responsibility differently depending upon where the record was filed.

3. Accessibility of Minutes of Settlement.

Because of my conclusions regarding the previous two issues, it is not necessary for me to decide the issue of whether the Minutes of Settlement in question would be accessible under the *Freedom of Information and Protection of Privacy Act*. Moreover, in the circumstances of this case, it would be inappropriate for me to undertake more than a cursory examination of this issue.

Section 10 of the *Act*, the provision which grants rights of access to information, reads as follows:

- (1) *Every person* has the right of access to a *record or part of a record* in the custody or under the control of an *institution* unless the record or the part of the record falls within one of the exemptions under sections 12 to 22.
- (2) Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

"Record" is defined very broadly in section 2 as "any record of information however recorded ...". The case law of the Information and Privacy Commissioner, insofar as I have examined it, provides no reason to believe that Minutes of Settlement would not be considered a record for the purposes of the *Act*.

Section 21 sets out an exemption for "personal information", defined in section 2, as well as exceptions to that exemption.

Section 2 defines "personal information", *inter alia*, as

Recorded information about an *identifiable individual, including* ... (b) information relating to ... the medical ... history of the individual ... or information relating to financial transactions in which the individual has been involved. (c) any identifying number, symbol or other particular assigned to the individual ... (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence ... (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

and has been held to refer to a natural person; i.e., not to a corporation, partnership, sole proprietorship or trade union. Therefore, only information regarding the natural persons involved in the settlement would be covered by this exemption.


The annotation produced by the government mentions no cases finding that Minutes of Settlement between private parties on file with an institution constitute personal information. There are a number of orders finding that Minutes of Settlement regarding grievance arbitration cases were exempt from disclosure, but on the basis of section 6 of the *Municipal Freedom of Information and Protection of Privacy Act*, which deals with records which would reveal the substance of deliberations of a council or board which is authorized to hold private meetings. The provincial legislation does not have a similar provision. Furthermore, this exemption from disclosure would not be applicable in any event to a settlement between private parties. (See cases M-184, 196, 206, 241, 310, 330, 353, 355 and 367.)

ORDER

As the parties to this proceeding have agreed to an Order of this Board concluding this matter on the basis that they have resolved the complaints to their satisfaction, and on reading the Minutes of Settlement, I

- (a) order that the Commission file a copy of the executed Minutes of Settlement with the Board of Inquiry, and
- (b) direct the Registrar of the Board of Inquiry to refer any request for access to the Minutes of Settlement to the Human Rights Commission.

DATED at Toronto this 18th day of January, 1996.



Raj Anand